ATTORNEY FOR APPELLANT:

JOHN (JACK) F. CRAWFORD
Crawford & Devane
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

MARY COX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0605-CR-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan D. Goodman, Judge
Cause No. 49F15-0404-FD-62749

October 4, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-defendant Mary Cox ("Cox") appeals the trial court's denial of her motion to correct error for convictions on five counts of conflict of interest by a public servant, all Class D felonies.[1] We affirm.

Issue

Cox raises two issues which we restate as:

I. Was Cox a "public servant" by virtue of her employment with the Indiana Family and Social Services Administration, and

II. Whether the misidentification of Cox's governmental employer in the charging information constitutes a fatal variance, where the charging information alleged that Cox was an employee of Marion County, but the evidence at trial showed that she was an employee of the State of Indiana.

Facts and Procedural History

Cox was employed by the Indiana Family and Social Services Administration ("FSSA"). Specifically, Cox worked within FSSA's Impact Program, whose function is to help people on public assistance in obtaining employment. Her duties involved assisting county governments, including Marion County, which worked directly with clients. Approximately one year prior to the events of this case, Cox signed an FSSA form in which she acknowledged receiving a copy of Indiana Code Section 35-44-1-3, the conflict of interest statute.

In addition to her state employment, Cox was an independent contractor with Advertising Specialties Co. ("ASC"), a company specializing in the sale of promotional

[1] Ind. Code § 35-44-1-3.

items. One of Cox's supervisors at FSSA, Matthew Raibley ("Raibley"), knew of Cox's involvement with "an advertising company," and asked her to submit a quote on a series of items. Cox did so. Ultimately, Cox sold five orders of items to FSSA, her employer. As compensation from ASC, Cox received half of the profit made on each order. Cox acknowledged that her share of the profit on all five orders totaled $1364.60.

On April 13, 2004, the State filed a charging information alleging that Cox had committed five counts of conflict of interest, a Class D felony. Each count stated, in error, that Cox was employed by the Marion County Division of Family and Children. That same day, the State filed an affidavit for probable cause, in which Officer Ryan Harmon testified to his investigation of this case. In ten testimonial statements, Officer Harmon accurately noted that Cox was an employee of FSSA.

Cox first challenged the State's inaccurate charging information during closing argument in the bench trial, moving simultaneously for judgment on the evidence and judgment of acquittal. The trial court took the matter under advisement, ultimately entering verdicts of guilty on all five counts. Cox was sentenced to 365 days imprisonment on four of the counts and 545 days imprisonment on the fifth, all counts running concurrently. The trial court suspended the 545 days imprisonment, placing Cox on probation. In addition, the court ordered Cox to perform 80 hours of community service and to pay $2729.20 in restitution.

Cox filed a motion to correct error, renewing her challenge to the inaccurate charging information. The trial court denied Cox's motion. She now appeals.

Discussion and Decision

I. Was Cox a Public Servant?

A public servant who knowingly or intentionally has a pecuniary interest in or derives a profit from a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony. Ind. Code § 35-44-1-3(a). Public servant is defined as a "person who is authorized to perform an official function on behalf of, and is paid by, a governmental entity." I.C. § 35-41-1-24(1).

On appeal, Cox argues that she was merely a public employee, not a "public servant," as defined above. In so arguing, Cox emphasizes that the definition of "public servant" has two elements: performing an official function and being paid. If the statute were meant to apply to all state employees, she suggests, the only requirement of being a public servant would be receiving payment from a governmental entity. The legislature's inclusion of "perform[ing] an official function" in the definition, she asserts, was intended to distinguish certain state employees from others.

Where a question is raised regarding a statute's effect, our review is well settled.

> The first step in interpreting a statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question. When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. Clear and unambiguous statutes leave no room for judicial construction.

Sees v. Bank One, Indiana, 839 N.E.2d 154, 157 (Ind. 2005) (citing Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941, 947 (Ind. 2001) and Poehlman v. Feferman, 717 N.E.2d 578, 581 (Ind. 1999)).

We disagree with Cox's interpretation of the statute. If the definition of "public servant" had the single element of being paid by a governmental entity, then vendors to governmental entities would qualify as "public servants." This was apparently not the legislature's aim in crafting the conflict of interest statute. To the contrary, by including performance of an official function as part of the definition, the legislature excluded from the definition persons selling goods. The plain meaning of the language is that a person is subject to the statute only if performing an official function of government. As Cox acknowledges, "[t]he conflict of interest statute, I.C. § 35-44-1-3, clearly is intended to protect the public from 'insider' dealing with regard to public contracts or purchases." (Appellant's Brief at 8) We agree.

The State introduced evidence that Cox worked for FSSA, performed independent contracting with ASC, sold five orders of items to FSSA, and thereby gained a profit of $1364.60.[2] We find that Cox was a public servant for purposes of the conflict of interest statute.

II. Was Variance in Charging Information Fatal?

Cox alleges that the statements in the charging information varied materially from the facts proved at her trial. The Indiana Constitution provides defendants in prosecutions the right "to demand the nature and cause of the accusation against him, and to have a copy thereof." IND. CONST. art. I, § 13. A variance is an essential difference between proof and pleading. Allen v. State, 720 N.E.2d 707, 713 (Ind. 1999) (citing Mitchem v. State, 685

N.E.2d 671, 677 (Ind. 1997)). Not all variances, however, are material or fatal. Id.

> In determining whether a variance is fatal, we examine the following:
>
> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of [her] defense, and was [she] harmed or prejudiced thereby;
>
> (2) will the defendant be protected in [a] future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Id.

Here, Cox was charged with conflict of interest, an element of which is service to a governmental entity. I.C. § 35-44-1-3(a). The State filed charging information alleging that Cox was an employee of Marion County. The facts proved at trial, however, established that Cox was, in fact, an employee of FSSA, a state government department. In closing argument, Cox asserted without explanation that she was prejudiced by this variance.

FSSA is responsible for administering programs related to social security, Medicaid, public welfare, and persons with disabilities.[3] There is no dispute that FSSA is a governmental entity, nor any suggestion that the nature or punishment of the crime would change depending on whether Cox was employed by FSSA or Marion County. Cox failed to object during presentation of the State's case, choosing instead to wait until closing argument to challenge the State's charging information. Furthermore, in Cox's challenge, she made no offer of proof or any suggestion of how the preparation of her defense would have been different if the charging information had alleged that she was employed by FSSA.

---

[2] This amount is in excess of the de minimis amount set forth in the conflict of interest statute. See I.C. § 35-44-1-3(h).

Essentially, the charging information misidentified Cox's employer. We trust that she understood the true identity of her employer. Cox was not misled by the State's charging information. Nor was she prejudiced. The State's affidavit of probable cause, filed the same day as the charging information, stated repeatedly and accurately that Cox was an employee of FSSA. Indeed, in closing argument, Cox revealed that she had been waiting for the State to amend its charging information.[4] Thus, Cox's preparation of her defense was not harmed by the State's original misidentification of her employer.

We look next to whether Cox will be protected against double jeopardy in a future criminal proceeding covering the same event, facts, and evidence. The federal Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend V. This right has been interpreted to prohibit "reprosecution of a defendant after the conviction has been reversed for insufficient evidence." Richardson v. State, 717 N.E.2d 32, 37 (Ind. 1999) (citing Burks v. United States, 437 U.S. 1, (1978)). If Cox's convictions were reversed, reprosecution would likely be barred because the facts to be proved would be the same.

In evaluating variances of the proof and pleadings, our courts have analyzed whether the variance related to an element of the crime, and whether the specific facts alleged were surplusage that could have been omitted entirely. Winn v. State, 748 N.E.2d 352, 356 (Ind. 2001) (citing Mitchem, 685 N.E.2d at 676). "The State is not required to include detailed

---

[3] See, e.g., I.C. § 12-9-5-1, -3, and -4, I.C. § 12-9.1-4-1, I.C. § 12-10-1-2, and I.C. § 12-13-5-1.

[4] Cox's attorney stated, "I kept wondering when they were going to try and tie those two things together but it appears to me to be a fatal error made in the information, but the[y] never did." Transcript at 116-117.

factual allegations in the charging instrument, though it may choose to do so." Id. (citing Richardson, 717 N.E.2d at 51). "When the factual allegations in the charge are not necessary to the sufficiency of the charge, a greater variance between the allegations and the proof is tolerated before finding the variance material or fatal." Id. (citing Allen, 720 N.E.2d at 713).

In Madison v. State, the information stated that the defendant's hand grenade was loaded with nitroglycerine, while the proof showed that it was filled with T.N.T. The Madison court found that, for the murder charge, language generally identifying the substance as an explosive would have sufficed. Madison v. State, 234 Ind. 517, 130 N.E.2d 35, 47 (1955). Several other cases have followed the reasoning in Madison.[5] Where courts have reversed convictions, the variance either amounted to an entirely different crime,[6] or the variance created ambiguity as to exactly which alleged criminal act was the subject of the charge.[7]

Here, Cox was charged with conflict of interest as a public servant of a governmental

---

[5] See Winn v. State, 748 N.E.2d 352 (Ind. 2001) (affirming conviction of criminal confinement where the charge included the words "refusing to let her leave," but the evidence showed that the defendant allowed the victim to go to the bathroom), Wessling v. State, 798 N.E.2d 929 (Ind. Ct. App. 2003) (affirming conviction of involuntary manslaughter where the State alleged that defendant hit the victim in the right eye, but the evidence showed that the fatal blow was probably to the left eye), and Hall v. State, 791 N.E.2d 257 (Ind. Ct. App. 2003) (affirming conviction of animal cruelty where the charged means of harming a cat arguably differed from the evidence).

[6] See Allen v. State, 720 N.E.2d 707 (Ind. 1999) (reversing conviction where statute distinguishes between a sex organ and an object and where the evidence of same was ambiguous) and Oberst v. State, 748 N.E.2d 870 (Ind. Ct. App. 2001) (reversing conviction where the State alleged sexual intercourse, but there was no evidence of actual penetration), trans. denied.

[7] See Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006) (reversing conviction where, at different times in the chase, the defendant fled different sets of police officers and where the charge and the proof varied on the identity of the officers) and Bonner v. State, 789 N.E.2d 491 (Ind. Ct. App. 2003) (reversing conviction of resisting law enforcement in facts very similar to Whaley).

entity. Because Cox was not misled, prejudiced, or potentially subject to double jeopardy, it is not material whether that governmental entity was Marion County or the State of Indiana. The variance between the State's charging information and its proof at trial did not constitute a fatal variance.

Conclusion

The trial court properly denied Cox's motion to correct error.

Affirmed.

RILEY, J., and MAY, J., concur.